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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID DANIEL MURPHY,

Defendant and Appellant.

In re

DAVID DANIEL MURPHY,

on Habeas Corpus.

E034130

(Super.Ct.No. RIF103779)

OPINION

E035365

(Super.Ct.No. RIF103779)

APPEAL from the Superior Court of Riverside County. Paul E. Zellerbach,
Judge. Affirmed.

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Paul E.
Zellerbach, Judge. Petition denied.

Nancy Olsen, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Marilyn L. George, Deputy Attorney General, for Plaintiff and Respondent.

1. Introduction

Defendant David Murphy appeals a judgment convicting him of second degree murder and sentencing him to 15 years in prison. Before the sentencing hearing, defendant filed a motion for new trial on the ground that Judge Paul E. Zellerbach was incapable of being impartial because Judge Zellerbach, a former deputy district attorney, had prosecuted defendant in a forgery case about 15 years earlier. Defendant claims that either reversal is required based on the conflict of interest or, as argued in his petition for writ of habeas corpus, his trial attorney provided ineffective assistance in failing to discover and object to the potential conflict earlier in the proceedings. Defendant also raises two additional claims: he was denied a right to a fair trial because there were repeated references to his prior criminal history; and insufficient evidence supported the jury's finding of malice aforethought.

We conclude that because Judge Zellerbach had no recollection of the prior case and because both the court and counsel did not discover the conflict despite their pretrial investigation into the matter, defendant cannot demonstrate that he was denied a trial by an impartial judge or representation by competent counsel. The record shows that Judge

Zellerbach conducted the entire guilt phase of the trial with the assumption that he had no prior contact with defendant. We also conclude that no prejudicial error resulted from the repeated references to defendant's criminal history. And substantial evidence supported the jury's verdict. We affirm defendant's conviction.

2. Factual and Procedural History

In 1996, defendant met Tabatha Peters at a homeless shelter at Fairmont Park in Riverside. They became romantically involved about six months later. Although defendant and Peters intended to get married, they frequently argued and occasionally dated other people. Sometimes their verbal arguments escalated to pushing and punching.

While defendant was in prison for a prior offense, Peters became romantically involved with defendant's best friend, Bryce Austin. Her relationship with Austin began just months before her death. A few weeks before Peters's death, Geraldine Lough, who was a close friend of Peters, heard defendant say, "if he could not have [Peters], Austin wasn't going to have her either, and he would kill them." Deborah Wettling, Peters's former roommate, also heard defendant threaten to kill Peters a week before her death.

On May 27, 2002, Peters approached defendant near the mall in downtown Riverside and asked him for money. The two used drugs together and Peters often asked defendant for money to buy drugs or cigarettes. When defendant refused to give her money, Peters started screaming and yelling at him. Peters left, but later returned to the tent she and defendant shared, which was located in a field on Spruce Street. That night at the tent, the two smoked marijuana, had sex, and then fell asleep.

During the night, defendant received a page and left the tent to make a phone call. Peters was awake when defendant returned, but fell back to sleep. In the morning, Peters accused defendant of cheating and the two began to argue. Peters told defendant she was leaving and started to pack her belongings. The argument turned physical and Peters and defendant pushed and hit each other. At some point, Peters fell and stopped breathing. Defendant put clothes on Peters's body, covered her with blankets and a sleeping bag, and left her in the tent.

A couple hours later, as defendant was riding around on his bicycle, he saw his friends, Ursula and William Wood, who lived together in their car. Defendant told them Peters was dead. The Woods drove to Fairmont Park and defendant agreed to meet them there. After defendant and William had some pancakes, defendant went to where Ursula was sitting and talked to her about Peters's death. Defendant explained that he and Peters had an argument because Peters was going to leave him. Defendant told Ursula, "if I can't have her, nobody else can have her, so he broke her neck." Defendant also told her that he covered her with blankets, which made her appear to be sleeping. He told her he was planning to dispose of the body by taking it to the riverbed in a shopping cart. After defendant left, the Woods reported the incident to the police.

At approximately 10:00 a.m. that same morning, Robert Powers ran into defendant at the mall in downtown Riverside. Defendant told Powers that his relationship with Peters was over and that "she was history." During their conversation, the police arrived and arrested defendant.

Officers later recovered Peters's body in the tent on Spruce Street. There were injuries to her neck and arm and bite marks on her breasts. Peters's injuries were consistent with strangulation.

During his subsequent police interview, defendant informed the officer that he had found Peters's body and it appeared that someone had choked her. After he admitted that he was with Peters the morning of her death, he claimed that he blacked out during the fight. At the time of his interview, defendant had scratches on his forehead and some abrasions to his neck. Defendant did not appear to be under the influence of drugs or alcohol.

On August 16, 2002, the Riverside County District Attorney filed an information charging defendant with willful, deliberate, and premeditated murder. (Pen. Code, § 187, subd. (a).) The district attorney also alleged that defendant had served a prior prison term for a 2001 theft offense. (Pen. Code, § 667.5, subd. (b).)

At the close of the jury trial, the jury found defendant guilty of second degree murder. In his motion for new trial, defendant argued there was insufficient evidence of malice aforethought to support the jury's verdict of second degree murder. After denying defendant's motion, the trial court sentenced defendant to an indeterminate term of 15 years to life.

Defendant filed a timely notice of appeal. Defendant also filed a petition for writ of habeas corpus on the ground of ineffective assistance of trial counsel. As requested, we will consider defendant's petition with his appeal.

3. Conflict of Interest

Defendant claims that reversal is required because the trial judge was a former prosecutor in one of defendant's prior cases. Defendant alternatively claims that his trial attorney provided ineffective assistance of counsel in failing to discover and object to the conflict earlier in the proceedings.

At the hearing on defendant's motion for new trial, defendant's trial attorney informed the court that defendant's father had found the 1988 plea agreement signed by defendant, his former trial attorney, and then Deputy District Attorney Zellerbach. Under the plea agreement, defendant agreed to plead guilty to two felony forgery offenses in exchange for probation.

Before trial on the current offense, both defendant's attorney and the court clerk conducted a search to determine whether Judge Zellerbach had prosecuted defendant in an earlier case. Neither discovered the 1988 case. Although Judge Zellerbach searched through the criminal charging documents and filed cases, he did not consider the plea agreement forms.

Judge Zellerbach explained that, during his 23 years with the Riverside County District Attorney's office, he handled thousands of cases and supervised different units, including the preliminary hearing unit. He had no specific recollection of defendant's case. After defendant's trial attorney requested that the plea agreement be admitted into evidence, the court responded, "there's no question this is my signature. So I will order that this be filed as part of the record in this case, and we'll leave it at that."

A. *Impartial Judge*

Defendant argues that Judge Zellerbach should have been disqualified under Code of Civil Procedure section 170.1, subdivision (a)(6).¹ Section 170.1, subdivision (a)(6), states that a judge shall be disqualified where “a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.” Defendant also argues that he was denied due process and his right to a fair trial.

The People argue that defendant has waived his right to question Judge Zellerbach’s impartiality because he did not move to disqualify Judge Zellerbach or move for a new trial on this ground.

Defendant responds that the waiver doctrine does not apply because a defendant may assert a violation of certain fundamental constitutional rights for the first time on appeal.

Although defendant frames the issue as a violation of both his statutory and constitutional rights, defendant failed to preserve the issue for appeal by not availing himself of his statutory remedy. (See *People v. Brown* (1993) 6 Cal.4th 322, 336; *People v. Barrera* (1999) 70 Cal.App.4th 541, 552 & fn. 6; *People v. Pratt* (1962) 205 Cal.App.2d 838, 845-846.) Under section 170.3, subdivision (c)(1), if a judge fails to disqualify himself, the party must present a statement objecting to the judge at the earliest practical opportunity after the party discovers the facts. If the party obtains an

¹ All further statutory references will be to the Code of Civil Procedure unless otherwise stated.

unfavorable ruling, he must seek review by writ of mandate because the ruling is not an appealable order. (§ 170.3, subd. (d).) “In order to give maximum effect to the Legislature’s clear intent that disqualification challenges be subject to prompt review by writ [citation], we conclude that a litigant may, and should, seek to resolve such issues by statutory means, and that his negligent failure to do so may constitute a forfeiture of his constitutional claim.” (*Brown, supra*, at p. 336.) An objection to the trial judge’s impartiality cannot be raised for the first time on appeal. (*People v. Scott* (1997) 15 Cal.4th 1188, 1207; *People v. Klaess* (1982) 129 Cal.App.3d 820, 824.)

In failing to move for disqualification below, defendant has waived the issue on appeal.

B. Effective Assistance of Counsel

Defendant alternatively argues that his trial attorney provided ineffective assistance of counsel in failing to discover the conflict and object to Judge Zellerbach’s further participation in defendant’s trial.

To establish constitutionally ineffective representation, defendant must show both that trial counsel’s performance fell below the standard of a diligent and reasonably competent attorney and that it is reasonably probable that a more favorable outcome would have resulted absent counsel’s deficient performance. (*People v. Lewis* (1990) 50 Cal.3d 262, 288, citing *Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *People v. Fosselman* (1983) 33 Cal.3d 572, 584; *People v. Pope* (1979) 23 Cal.3d 412, 425.)

““A reasonable probability is a probability sufficient to undermine confidence in the

outcome.”” (*People v. Scott, supra*, 15 Cal.4th at pp. 1211-1212, quoting *Strickland, supra*, at p. 694.)

Defendant first claims that a reasonably competent attorney would have discovered the 1988 case. “In the context of a potential pretrial motion counsel has a duty to research the law, investigate the facts and make the motion in circumstances where a diligent and conscientious advocate would do so. [Citation.]” (*People v. Gonzalez* (1998) 64 Cal.App.4th 432, 437, citing *In re Neely* (1993) 6 Cal.4th 901, 919.) Specifically, to show that counsel failed to conduct an adequate investigation into the facts, the defendant must demonstrate that counsel knew or should have known that further investigation was necessary. (*In re Cox* (2003) 30 Cal.4th 974, 1016; *In re Clark* (1993) 5 Cal.4th 750, 766.)

According to his declaration, defendant’s father informed defendant’s trial attorney before jury selection that Judge Zellerbach had prosecuted defendant in a prior case. During the jury trial, defendant’s father conducted his own search in the records department of the Riverside County Superior Court and located defendant’s 1988 plea form.

The information provided by defendant’s father would have caused a reasonable attorney to investigate the matter, as defendant’s trial attorney did. Defendant’s attorney immediately disclosed the potential conflict and conducted a search into Judge Zellerbach’s prior cases as a former prosecutor. Defendant’s attorney explained that he had searched the prior cases and the court confirmed that counsel had made the effort. Before the hearing on the motion for new trial, defendant’s attorney, speaking to the

court, said: “I know we had discussed this prior to trial and I thought we did an extensive search, and I wasn’t concerned prior to trial.” Judge Zellerbach responded: “We did. What I had my clerk do was pull every case print of every case that Mr. Murphy had in the Riverside County Superior Court judicial system. We looked at the case prints. I think we even pulled the files and looked to see if I filed any of the cases or signed any of the complaints or informations, and I had not.” Judge Zellerbach admitted, however, that he “didn’t look at the plea forms.”

A reasonable attorney would not have known to look further after the trial judge confirmed that no conflict existed. Defendant’s attorney acted as a diligent and reasonably competent attorney when he immediately informed the court of the potential conflict and personally investigated the matter. Despite the ease of defendant’s father’s subsequent discovery, neither counsel nor the court was as fortunate. The record indicates that defendant’s trial attorney conducted an adequate investigation. We conclude that defendant has failed to show that his trial attorney provided constitutionally defective representation by failing to investigate further into the potential conflict.

Defendant next claims that, when defendant’s father provided his trial attorney with a copy of the plea agreement form, he should have moved to disqualify Judge Zellerbach under section 170.1, subdivision (a)(6). It is unnecessary, however, to determine whether defendant’s trial attorney’s performance was deficient before examining whether defendant suffered any prejudice as a result of the alleged deficiencies. A claim of ineffective assistance necessarily fails if defendant cannot demonstrate sufficient prejudice. (*In re Cox, supra*, 30 Cal.4th at p. 1020.)

In this context, defendant cannot demonstrate prejudice if a motion under section 170.1, subdivision (a)(6), would not have changed the outcome. Under section 170.1, subdivision (a)(6), disqualification is required if a reasonable person who is aware of all the facts would entertain doubts concerning the judge's impartiality. (*Flier v. Superior Court* (1994) 23 Cal.App.4th 165, 170.)

In *Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224 (*Sincavage*), the defendant was charged with drug possession, felony evasion, and two prior convictions. Early in the proceedings, the prosecutor informed the trial judge, Judge Barbara Zuniga, that she had served as the calendar deputy district attorney in defendant's prior conviction cases. Under the mistaken impression that she served only that limited role in the prior cases, Judge Zuniga remarked, "If in fact, Mr. Sincavage, I had taken your plea, if I had prosecuted one of your cases, I would automatically recuse myself. I would not hear the case. [¶] From looking at the transcript, I merely called your case and another prosecutor and Mr. Coleman . . . from the Public Defender's Office were actually involved in the plea itself." (*Id.* at p. 227.) Based on this information, the defendant waived the conflict and Judge Zuniga presided over defendant's current trial. A different attorney represented the defendant during the sentencing hearing. At the hearing, the defendant's new attorney moved for disqualification after discovering that Judge Zuniga, as the prosecutor in the prior cases, had conducted the preliminary examination. Judge Zuniga stated that she had no recollection of the prior cases and had no reason to discontinue presiding over the defendant's current trial. A different trial judge denied the defendant's motion.

In *Sincavage*, the defendant filed a petition for writ of mandate to require the disqualification of Judge Zuniga. In granting the petition, the appellate court focused on two facts that gave cause for doubting Judge Zuniga's impartiality: one, that Judge Zuniga actively prosecuted the priors and, two, Judge Zuniga's earlier statement that she would recuse herself if she had taken a more active role. (*Sincavage, supra*, 42 Cal.App.4th at p. 230.) As noted by the appellate court, while Judge Zuniga may have been impartial in presiding over the defendant's trial on his current offenses, a person would have a legitimate cause for concern over her ability to be impartial during the trial on the prior convictions and the sentencing hearing. (*Id.* at p. 231.) "Because of the timing peculiar to the instant motion, disqualification would not invalidate the judgment of conviction of the current offenses. Under section 170.3, subdivision (b)(4), only proceedings after the grounds for disqualification were discovered would be affected." (*Ibid.*)

In this case, even if defendant's trial attorney moved to disqualify Judge Zellerbach or included the potential conflict as an additional ground in the motion for new trial, there is no reasonable likelihood that a different outcome would have resulted. As in the *Sincavage* case, Judge Zellerbach was unaware of the conflict until after the trial on the current offense. However, unlike in the *Sincavage* case, defendant's prior convictions did not govern the punishment in the current offense. (See *Sincavage, supra*, 42 Cal.App.4th at p. 231.)

The trial on the current offense was untainted by any known conflict. If the court has no knowledge of a conflict, there is no reason to suspect any bias or prejudice and

there is no basis for disqualification. “Judicial responsibility does not require shrinking every time an advocate asserts the objective and fair judge *appears* to be biased. The duty of a judge to sit where not disqualified is equally as strong as the duty not to sit when disqualified.” (*United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 100.)

Judge Zellerbach conducted the entire guilt phase of the trial under the assumption that he had not prosecuted defendant in any prior cases. The court conducted a preliminary search into the matter and came up empty-handed, thereby confirming that no conflict existed. It is impossible for the court to be biased against defendant based on a prior encounter that the court assumed did not happen.

Judge Zellerbach only learned of the prior case after the jury returned its verdict and before the sentencing hearing. The prior case had no effect on defendant’s punishment. At the sentencing hearing, the court imposed the statutorily required penalty of 15 years to life. (Pen. Code, § 190, subd. (a).) Also, as discussed below, the court correctly ruled on the motion for new trial. The record reveals no indication of bias or prejudice as Judge Zellerbach presided over the remainder of defendant’s trial. Under these circumstances, we cannot conclude that defendant’s trial attorney’s failure to move to disqualify Judge Zellerbach resulted in a fundamentally unfair proceeding or an unreliable verdict. (See *In re Cox, supra*, 30 Cal.4th at p. 1016.)

In summary, we conclude that, because defendant’s trial attorney conducted an adequate search into the matter early in the proceedings, he did not provide constitutionally defective representation in failing to discover the conflict and submit a

pretrial motion to disqualify Judge Zellerbach. We also conclude that, even if defendant's trial attorney should have taken action after obtaining a copy of the plea agreement form, defendant cannot establish that a different outcome would have resulted. We therefore reject defendant's claim of ineffective assistance of counsel.

4. Other Crimes Evidence

Defendant claims he was denied due process and a fair trial because of the repeated references to his prior criminal history during the trial. Despite the court's pretrial ruling to exclude references to the words "prison" and "parole," the jury heard several statements referring to defendant's prior prison sentence and parole status. Defendant cites to the following instances: Officer Matthew Lewis, who assisted in the investigation into Peters's death, testified that he was provided a description of defendant which included that "the subject was on parole"; Deborah Wettling, Peters's former roommate, testified that she answered a phone call from defendant and that "[w]hen they call from state prison, they state what prison they're calling from"; and, during defendant's police interview, which was transcribed for the jury, one of the officers asked, "So when you got back out, when was that?"

Defendant claims that, based on these inappropriate references, his trial attorney decided to call defendant to testify and explain his prior criminal history. On direct examination, defendant testified that he went to prison in 2000 because he "stole for drugs." During defendant's direct and cross-examinations, defendant and the prosecutor made additional references to defendant's prior conviction and prison sentence.

Defendant argues the trial court erred in refusing to declare a mistrial. A trial court should grant a mistrial only when the defendant's chances of receiving a fair trial have been irreparably damaged. (*People v. Burgener* (2003) 29 Cal.4th 833, 873; *People v. Welch* (1999) 20 Cal.4th 701, 749.) If the court denies a motion for mistrial, a reviewing court must uphold the ruling absent an abuse of discretion. (*Burgener, supra*, at p. 873.)

We find no abuse of discretion. At each juncture, the court properly exercised its discretion and provided an adequate remedy. After Officer Lewis's statement, defendant raised his first objection. The court sustained the objection and instructed the jury to disregard the last part of Lewis's answer. Unless the record indicates otherwise, we must assume that the jury followed the court's instruction. (*People v. Burgener, supra*, 29 Cal.4th at p. 874; *People v. Pinholster* (1992) 1 Cal.4th 865, 943.)

When defendant objected to Wettling's statement and moved for mistrial, the court repeatedly advised the prosecutor to exercise greater control during her examination and to instruct the witnesses to avoid any inappropriate comments. The court also commented, "I think in the grand scheme of things, given all the evidence that we've heard, that this testimony is not so prejudicial as to deny Mr. Murphy a fair trial. So I'm going to deny the defense motion for a mistrial yet again. But I hope this is the last time we have to visit this issue."

After the jury heard the tape of the police interview, defendant again objected on the same ground. The prosecutor explained that, although she had edited the tape to remove a reference to the word "prison," she had neglected to cross out this related

question. While the court acknowledged that anyone could infer that the officer's question referred to prison, it found that the question was relatively innocuous. The court concluded that the cumulative effect of the repeated references was not prejudicial when considered with all the evidence presented to the jury. The court again refused to declare a mistrial. To minimize any prejudice, the court allowed the prosecutor to eliminate the additional lines before giving the jurors a copy to consider during their deliberations.

As defendant correctly notes, evidence of other crimes is inadmissible when offered solely to prove criminal disposition. (Evid. Code, § 1101, subd. (a); *People v. Koontz* (2002) 27 Cal.4th 1041, 1083.) The objectionable statements, however, were not elicited by the prosecution to prove defendant's criminal disposition, but unexpectedly and inadvertently made by the witnesses. (See *People v. Pinholster*, *supra*, 1 Cal.4th at p. 943.) As the inappropriate statements were made, the court and counsel made every effort not to draw attention to them. The statements did not refer specifically to any particular crime or conduct. As noted by the court, the references to "prison" or "parole," even when considered together, were not prejudicial. We must defer to the trial court's determinations as to the probative value and prejudicial effect of the challenged evidence. (See *People v. Michaels* (2002) 28 Cal.4th 486, 532.) The record confirms that the references were merely isolated statements usually made to establish or explain other facts, such as Wettling's knowledge concerning the identity of the caller and the gap in defendant's relationship with Peters during his incarceration. We conclude that the trial court did not abuse its discretion in overruling defendant's objections and denying his motions for mistrial.

Furthermore, the additional references to the word “prison” during defendant’s cross-examination did not deny defendant a fair trial. Defendant did not object to the prosecutor’s questions. Moreover, as mentioned above, defendant had already discussed his prior prison sentence during his direct testimony. Although defendant claims that he testified to explain his criminal history, the record reveals that defendant testified to substantiate his defense theory. In addition to the brief discussion of his criminal history, defendant provided a lengthy account of the killing and the events surrounding the killing. Any additional references to defendant’s prison term, therefore, were not unduly prejudicial. (See *People v. Burgener, supra*, 29 Cal.4th at p. 875.) Also, based on defendant’s direct examination, the prosecutor’s questions were well within the proper scope of cross-examination. (See *People v. Barnett* (1998) 17 Cal.4th 1044, 1170-1171.) In fact, most of her questions were designed to impeach defendant’s prior statements or cast doubt on his credibility.

We conclude that defendant was not denied due process or a fair trial by the repeated references to defendant’s prior criminal history.

5. Malice Aforethought

In his final claim, defendant argues that insufficient evidence supported the jury’s finding that the killing was committed with malice aforethought. Defendant argues that the evidence overwhelmingly established that he killed Peters in the heat of passion during a verbal and physical confrontation where Peters accused defendant of cheating and threatened to leave him.

In reviewing a claim of insufficiency of the evidence, we must determine whether the record contains substantial evidence -- i.e., evidence that is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 396; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We review the entire record in the light most favorable to the judgment and we accept as true every logical inference necessary to support the jury's finding. (*Maury, supra*, at p. 396.) Even if the circumstances also may be reconciled with a contrary finding, we must affirm the judgment so long as substantial evidence supports the jury's finding. (*Rodriguez, supra*, at p. 11.)

A person commits a second degree murder when he unlawfully kills another human being with malice aforethought, but without premeditation and deliberation. (Pen. Code, §§ 187 & 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Malice can be either express, when there is an intent to kill, or implied, when the circumstances show a conscious disregard for human life. (Pen. Code, § 188; *People v. Rios* (2000) 23 Cal.4th 450, 460.) A person commits voluntary manslaughter when he unlawfully kills another human being without malice, but acts in the heat of passion or unreasonable self-defense. (Pen. Code, § 192; *People v. Lasko* (2000) 23 Cal.4th 101, 108.) A person acts upon a sudden quarrel or heat of passion if his reason is obscured by a strong passion aroused by provocation sufficient to cause an ordinary person to act rashly or without due deliberation. (*Lasko, supra*, at p. 108.)

In this case, substantial evidence supported the jury's finding that defendant killed Peters with malice aforethought, rather than under the heat of passion. Defendant's

statements to two witnesses prior to Peters's death indicate that he harbored an intent to kill. Geraldine Lough testified that defendant said, "if he could not have [Peters], Austin wasn't going to have her either, and he would kill them." Defense witnesses attempted to downplay this evidence by describing defendant as a person who often made such threats with no intent of carrying them out. The jury, however, could have rejected defendant's evidence and believed that defendant acted with express malice.

After the killing, defendant echoed his prior threats in his confession to Ursula Wood, "if I can't have her, nobody else can have her, so he broke her neck." Defendant's statement indicates that, despite the argument between defendant and Peters, the killing resulted from defendant's intentional act. The statement also shows that the situation was not completely out of control, but that defendant knew what he was doing when he strangled Peters to death.

The physical evidence also supports the jury's finding of malice aforethought. Defendant testified that, during a mutual struggle, Peters grabbed him around his neck and he reacted by swinging his arm and striking her in the neck. Contrary to defendant's claim that Peters died as a result of defendant's blow, the prosecution expert testified that Peters's injuries were caused by strangulation. Strangulation indicates a deliberate intent to kill. (*People v. Hernandez* (1988) 47 Cal.3d 315, 349.) The expert explained that, during manual strangulation, unconsciousness occurs within 10 to 30 seconds, but brain damage and death occur after an additional minute of pressure. From this evidence, the jury reasonably could have inferred that when defendant held Peters's neck even after she

fell unconscious, he was no longer under the influence of their heated argument, but deliberately carried out his threat to kill her.

As the verdict indicates, although defendant presented evidence to suggest that he acted under a sudden quarrel or heat of passion, the jury rejected defendant's evidence and found that he acted with a deliberate intent to kill. One court observed: "Even if defendant's testimony provided some evidence of provocation for the jury to consider, it remains the jury's exclusive province to decide whether the particular facts and circumstances are sufficient to create a reasonable doubt as to whether the defendant acted under a heat of passion. [Citations.] Here, the jury was properly instructed on voluntary manslaughter and heat of passion or sudden quarrel. They found malice, and we conclude the evidence is sufficient to support the finding." (*People v. Bloyd* (1987) 43 Cal.3d 333, 350.) Likewise, in this case, substantial evidence supported the jury's finding of malice aforethought.

Defendant nevertheless argues that the jurors arbitrarily disregarded the law in their haste to reach a verdict. We disagree. The jury's requests and questions indicate that it reached its verdict after careful deliberation of the law and facts. During deliberations, the jury submitted the following request: "We would like [to] have you clarify the term 'disregard for human life.' Were [*sic*] referring to the jury instruction under implied malice." When the court brought the jury back into the courtroom, the court was handed a second request: "We desperately need clarification of malice aforethought [*sic*]—emphasis on aforethought—Please—also can there be malice of forethought [*sic*] [with] heat of passion." After conferring with counsel, the trial court

responded to the jury's inquiries by providing further instructions on the terms "disregard for human life," "aforethought," and "heat of passion." The jury continued its deliberations.

On the next day, the jury submitted the following statement: "We have come to a dead end in our discussions. We have made no progress in our thinking in a day—we can not reach a unanimous decision despite continuous discussion. We feel we can't resolve this." In response to the court's inquiry, the foreman explained that the jurors were deadlocked between a verdict of second degree murder and a verdict of voluntary manslaughter. The foreman also explained that the jurors continued to have a problem with the same terms discussed during the previous day. The court offered to provide additional assistance, but told the foreman to put the jury's request in writing. Before submitting a request, however, the jury returned with a verdict of second degree murder.

While a verdict was unexpected, nothing in the record suggests that the jury arrived at the verdict in haste to avoid further deliberations. The court provided various standard instructions on the jury's duty to deliberate. The court also provided a lengthy admonition on the importance of jury deliberations and their responsibility to work together. The court specifically advised, "you're all independent judges of the facts. And I'm not in any way saying, well, you're supposed to give in to the majority. That's not the case. You're supposed to work as a team. And hopefully you can come to a resolution." The court also attempted to accommodate their needs and schedules. With the Easter holiday approaching, the court offered to allow the jury to break for the weekend and resume deliberations on Monday. Based on the court's admonitions, we

must presume that the jury properly performed its duty. (See *People v. Cruz* (2001) 93 Cal.App.4th 69, 73.) We reject defendant's efforts to undermine the jury's verdict.

We also reject defendant's claim that there was insufficient evidence of malice aforethought. As discussed above, substantial evidence supported the jury's verdict of second degree murder.

6. Disposition

We affirm defendant's conviction. We deny defendant's petition for writ of habeas corpus.

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s/Gaut
J.

We concur:

s/McKinster
Acting P.J.

s/Richli
J.